Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1996

GREGORY P. GOEHRING, *et al*,
Petitioners,

v.

ROY T. BROPHY, Jr., *et al*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED FOR REVIEW

1. May a state operated university condition enrollment upon students agreeing to subsidize abortions in conflict with the students' sincerely held religious beliefs opposing financial support for abortions?

2. Are civil rights plaintiffs entitled to an attorney fee award pursuant to 42 U.S.C. § 1988 when the government entity ceases the challenged conduct but claims the cessation was motivated by a similar, but separate, lawsuit?

PARTIES TO THE PROCEEDING

The petitioners in this matter are former students of the University of California at Davis (UCD). Specifically, their names are Gregory P. Goehring, David Mueller, John P. Gisla, Jr., Nancy Harder, Glenn Nunes, and John Mullen.

The respondents are regents of UCD. Specifically, their names are Roy T. Brophy, Jr., David Pierpont Gardner, Theodore L. Hullar, and Robert E. Chason.

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at *Goehring v. Brophy*, 94 F.3d 1294 and is reproduced herein at Appendix A.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was entered on September 3, 1996. Thereafter, petitioners sought rehearing which was denied by the Court of Appeals on October 25, 1996. A copy of the order denying rehearing is reproduced at Appendix B.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provision as issue in this case are the First and Fourteenth Amendments to the United States Constitution. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

The statutes at issue are 42 U.S.C. § 1988 and 42 U.S.C. § 2000bb. 42 U.S.C. § 1988 provides:

> (b) Attorney's fees

> In any action or proceeding to enforce a provision of section 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000bb provides:

> (a) In General
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial Relief
>
> A person whose religious exercise has been burdened in violation of this section may assert

that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

STATEMENT OF THE CASE

Petitioners were students at the University of California at Davis (UCD). They brought this action against UCD officials challenging the requirement that they subsidize, through a mandatory fee, political and ideological activities of various organizations. The students argued that the use of a mandatory fee to finance speech with which they disagreed violated their rights to freedom of conscience, freedom of association, and freedom of speech under the First Amendment. The suit also challenged under the Establishment Clause religious ritual engaged in as a part of classes conducted by the Associated Students of California at Davis (ASUCD). Finally, the students' suit challenged on Free Exercise grounds the requirement that all students subsidize abortion services through the University's health insurance.

While the suit was pending in federal district court, the university officials agreed to stop the mandatory funding of political and ideological speech. This decision rendered the claims relating to the forced sponsorship of speech activities moot, as well as the Establishment Clause claim relating to the religious ritual engaged in and promoted by the ASUCD. The students and the university officials agreed to file cross motions for summary judgment on the remaining claim that the requirement that all students subsidize health insurance which finances abortion services violates these objecting students' rights to religious freedom under the First Amendment.

The cross motions for summary judgment were based on a stipulated statement of facts. All students are required to pay a Registration Fee and an Educational Fee (which is

like tuition). The university provides to students health insurance that covers the cost of providing abortions. Those who purchase the insurance pay the entire premium, less a discount derived from an $18.50 per quarter per student subsidy taken by the Registration Fee paid by all students.

All parties agreed that these students' sincerely held religious beliefs prohibit them from financially contributing to abortions because they believe abortion constitutes the killing of unborn, innocent children. The university officials offered no evidence demonstrating any burden in offering insurance which does not provide abortion services or any burden in ending the subsidy from students who oppose financial support of abortions on religious grounds.

The district court denied the students' motion for summary judgment and granted that of the university officials. An appeal to the Ninth Circuit Court of Appeals followed.

Meanwhile, the students filed a motion for attorneys' fees pursuant to 42 U.S.C. § 1988 because, during the course of the litigation, the university officials agreed to stop the conduct which the students contended violated their First Amendment speech, association and Establishment Clause rights. In response to the students' motion, the university officials claimed they agreed to stop the challenged conduct, not because of these students' legal action, but because a case decided by the California Supreme Court in a similar case indicated the university's required subsidy of speech was unconstitutional. *Smith v. University of California*, 4 Cal. 4th 843, *cert. denied*, 126 L.Ed.2d 140 (1993). Hence, the university officials argued that the present litigation was not a catalyst for their change in policy, but that the *Smith* case was.

The district court agreed with the university officials and denied the students' motion for attorneys' fees. A separate appeal from the denial of this motion was filed in the Ninth Circuit Court of Appeals.

The two appeals were consolidated by the Ninth Circuit and a decision was rendered on September 3, 1996. The students sought rehearing, but the petition for rehearing was denied on October 25, 1996.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1 lists among the considerations governing review on certiorari the circumstances appropriate for a writ of certiorari: when a federal court of appeals has rendered a decision in conflict with another state's court of last resort or with a United States Court of Appeals or has decided a federal question in a way as to call for an exercise of this Court's power of supervision. All of these grounds for review are present in this case.

ARGUMENT
I
THIS COURT'S DECISION IS IN CONFLICT WITH THOSE OF OTHER UNITED STATES COURT OF APPEALS

The Ninth Circuit ruled that the entry of summary judgment against these students' Free Exercise Clause claim was appropriate because they failed to prove a substantial burden to a central tenet of their faith and, even if such burden could be proved, the university has a compelling interest in continuing the scheme to require all students to subsidize abortions.

First, the ruling that the students have failed to meet the burden of showing compelled payment for abortions "imposes a substantial burden on a central tenet of their religion" is contrary to this Court's treatment of Free Exercise claims. App. A at 11086. Additionally, the Ninth Circuit's conclusions were made despite an agreement among the parties that the payment of a fee to fund abortions violated the students' sincerely held religious beliefs. *Id.* at n.5. The Ninth Circuit's decision essentially holds that government can withhold a public university education upon students' willingness to violate sincerely held religious beliefs as long as the scheme does not impose a substantial burden on a central tenet of one's faith. The distinction between "sincerely held religious beliefs" and "central tenets" is no where explained.

The problem with the Ninth Circuit's decision is that it expects courts to weigh between "sincerely held religious beliefs" and "central tenets." This Court has repeatedly held that "it is not within the 'judicial function and judicial competence' to determine the accuracy of religious faith." *United States v. Lee*, 455 U.S. 252 (1982) (quoting *Thomas*

v. Review Board of Indiana Employment Security, 450 U.S. 707, 716 (1981)).

Only when claimed religious convictions are "so bizarre, so clearly nonreligious in motivation," can a court disregard the conflict between government policy and one's faith. *Thomas*, 450 U.S. at 715. The Ninth Circuit did not find the students' opposition to be nonreligious or bizarre; it simply found these students' particular beliefs less weighty or important than undisclosed "central tenets." Such distinctions are a dangerous path for the judiciary to begin down and one which this Court has repeatedly warned against.

The Ninth Circuit also minimized the burden on the students in terms of what they were required to give up should they stand to their convictions and refuse to pay a fee to support abortions: an education at the University of California. "The plaintiffs are free to attend the University so long as they accept the minimal limitation placed on their free exercise rights by the University's registration fee." App. A at 11086.

This conclusion is contrary to this Court's explanation that the Free Exercise Clause may be violated even when exercise of one's religion is not directly restricted, but when withholding a significant government benefit. The condition may still constitute a burden which is "nonetheless substantial." *Thomas*, 450 U.S. at 718. No court to petitioners' knowledge has ever suggested that a public education is not a significant government benefit. *Cf. Widmar v. Vincent*, 454 U.S. 263 (1981).

This Court has articulated standards for reviewing government regulations that require a choice between fidelity to a religious belief or an important government benefit.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas, 450 U.S. at 717-18. There could be no dispute that the university officials' requirement that all students at UCD subsidize abortion makes students choose between following their religious beliefs and receiving an education from UCD.

The Ninth Circuit also concluded that, even if forcing students to violate their sincerely held religious beliefs was a substantial burden on free exercise rights, the university's insurance plan survives strict scrutiny. The Ninth Circuit cited several governmental interests at stake.

> (1) The University's health insurance system provides its students with affordable health insurance. A large number of students would be unable to obtain affordable health insurance from another source if it was not available through the University.

App. A at 11087.

The students never challenged the **existence** of university sponsored insurance. They challenge the requirement that they provide a subsidy to the insurance as long as it finances abortions. There was no evidence submitted to the district court in this matter to indicate that any student, let alone a "large number", would be unable to obtain insurance without the subsidy by objecting students in particular or all students for that matter.

> (2) The University's affordable health insurance helps to present the spread of communicable diseases which pose a serious problem on university campuses where students eat, sleep, and study in such close quarters.

App. A at 11087. Again, this argument may present a compelling interest to support insurance generally. It is not a reason to require all students to subsidize other students' elective health procedures.

> (3) The University's affordable health insurance prevents students from being distracted from their studies by undiagnosed illnesses and medical bills which they cannot afford to pay. The insurance system is planned so that students will remain healthy and be able to receive the full benefits of a higher education.

App. A at 11098. This conclusion deserves the same response. It does not support the existence of a compelling interest in mandatory subsidy of abortion covering insurance. Essentially, the Ninth Circuit has weakened the requirement of strict scrutiny.

In analyzing least restrictive means, the Ninth Circuit relied extensively on *United States v. Lee*, 455 U.S. 252 (1982), a case where an Amish employer objected to paying social security tax. The Court of Appeals dismissed this Court's distinction between moneys paid as taxes and fees collected as a condition to permission engage in particular activities. In *Keller v. State Bar of California*, 496 U.S. 1 (1990), this Court held that fees paid to the Bar should not be considered as taxes because "[i]ts members and officers are such not because they are citizens and voters, but because they are lawyers." *Id.* at 13. Similarly, the students do not

pay these fees because they are citizens of California or citizens of Davis, but because they are students.

The Ninth Circuit distinguished *Keller* on the basis that Free Exercise rights are less important than Free Speech rights, that the compulsion on lawyers to support the Bar is more significant than the compulsion on students, and that the university provides services akin to governments. App. A at 11092-93. The petitioning students herein submit that these distinctions are not significant, but merely tools to restrict the significance of this Court's decision in *Keller*.

Moreover, the Ninth Circuit required no evidence to demonstrate a burden to the university in accommodating the students' interests. Yet, California Education Code, Section 76355 exempts students of some faiths from paying a health service fee. Since some students' religious beliefs can be accommodated, it is difficult to see why the petitioning students' religious beliefs are entitled to less.

The students urge this Court to grant this petition and settle these significant legal issues.

II
THE COURT'S DENIAL OF AN ATTORNEYS' FEES AWARD IS CONTRARY TO SEVERAL DECISIONS OF OTHER CIRCUIT COURTS

The Ninth Circuit ruled that the students are not entitled to recover attorneys' fees, even though they received the bulk of the relief sought in the case, because the university officials could point to something other than the students' suit as the motivation behind the decision to change their policy. Specifically, the university officials claimed, and the Ninth Circuit agreed, that the motive for the change in policy was the California Supreme Court's decision in *Smith v. Regents of the University of California,* 844 P.2d 500 (1993).

This decision is contrary to the longstanding rule of liberal construction of the causation requirement for a party to be a "prevailing party" under 42 U.S.C. § 1988. The purpose of the statute is to attract competent counsel to assist the courts with important civil rights litigation. *Aho v. Clark*, 608 F.2d 365, 367 (9th Cir. 1979). The Ninth Circuit's decision conflicts with other decisions of that court which call for a liberal construction of the attorneys' fees provision of the Civil Rights Act. *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980).

> [F]rom a policy standpoint, if defendants could deprive plaintiffs of attorneys' fees by unilaterally mooting the underlying case by conceding to plaintiffs' demands, attorneys might be hesitant about bringing these civil rights suits, a result inconsistent with Congress' intent in enacting section 1988.

Baumgartner v. Harrisburg Housing Authority, 21 F.3d 541, 548 (3rd Cir. 1994).

Consequently, the Third Circuit requires its district courts to "apply the most expansive definition of causation" in order to effectuate the purpose of Section 1988. *Metro Pittsburgh Crusade for Voters v. Pittsburgh*, 964 F.2d 244, 251 (3rd Cir. 1992). By allowing the university officials to escape responsibility for fees when they discontinued unconstitutional practices only after running up a large tally of attorney time by the challenging students' pro bono counsel in successfully defending against multiple motions to dismiss, the Ninth Circuit's approach conflicts with the Third Circuit's expansive treatment of causation.

Both the Fifth and Eighth Circuits employ expansive definitions of causation as well. In *Heath v. Brown*, 858 F.2d 1092 (5th Cir. 1988), the court recognized that plaintiffs were prevailing parties when a city changed police practices after plaintiffs filed suit even though the police chief had testified that he was unsure of any relationship between the lawsuit and the changed policy. *Id.* at 1094. "It is not necessary for the plaintiffs' lawsuit to be the sole cause or even the primary cause of defendants' decision to settle." *United Handicapped Federation v. Andre*, 622 F.2d 342, 346-47 (8th Cir. 1980).

The Ninth Circuit's decision is also directly contrary to decisions of several other Court of Appeals' decisions where a civil rights defendant stopped the conduct challenged in the suit and claimed that a separate court decision was the reason it stopped its conduct.

In the leading Section 1988 case, *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1988), the First Circuit held that it was error for the District Court to deny fees on the basis that

some other suit cased the defendant to see the error of its ways.

> [T]he mere existence of other similar suits by other plaintiffs should not automatically be considered a basis for diminishing a plaintiffs' award. Such a doctrine would, contrary to the objectives of the Attorney's Fees Awards Act, be a powerful disincentive to legitimate actions, for the fact that there was more than one suit against officials of an institution would not merely bar the later attorneys from compensation but would jeopardize the fees of counsel in the original suit.

Id. at 281 (footnote omitted).

The same analysis was applied in *Ben David v. Travisano*, 621 F.2d 464 (1st Cir. 1980). In that case, the First Circuit held that the district court erred in denying fees on the basis that a separate lawsuit had led to the same legal results. *Id.* at 467-68.

The Third Circuit also has resolved these issues contrary to the position of the Ninth Circuit in the present case. In *Morrison v. Ayoob*, 627 F.2d 669 (3rd Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1102 (1981), the plaintiffs sued judges over a practice of sending convicted indigent defendants to jail for petty offenses without assistance of counsel. The defendant judges stopped the practice after receiving a letter from the Presiding Judge instructing them to stop and after a court ruled the practice was unconstitutional in another, unrelated case.

The Court of Appeals held that, despite this other court order on the same legal grounds, the plaintiffs were entitled to a fee award.

> To hold otherwise would be inconsistent with the broad remedial purposes of section 1988 because in many cases causation will hinge on the defendant's motivation. To require some stricter standard of causation would mean that the defendant could hide his true motivation behind that which seems a plausible justification.

Id. at 671. *See also Rock Creek Limited Partnership v. State Water Resources Control Board*, 972 F.2d 274, 277 (9th Cir. 1992).

The refusal to award attorneys' fees must also be viewed in the context of the procedural history of this litigation. After this case was filed, the California Supreme Court decision in *Smith* was handed down. Thereafter, the university officials attempted twice to have the students' case dismissed, arguing that the state court's decision in *Smith* should be ignored. App. A at 11097.

The bulk of the students' attorneys' fee motion was for time defending against the university officials' attempt to have their case dismissed. Under the Ninth Circuit's analysis, the students should have looked into the future, realized the university officials would change their minds and no longer try to relitigate the federal issues they lost in state court, and saved their pro bono counsel's time by not opposing the multiple motions to dismiss. This basis for the Ninth Circuit's decision distorts the purpose of the Civil Rights Act in encouraging vigorous enforcement of civil rights by pro bono counsel.

The Ninth Circuit sends the wrong message to civil rights litigants: If you are fortunate to prevail by the government recognizing the error of its ways, you will not receive an award of attorneys' fees if some other litigant in

another case prevails before you do. The result is that civil rights litigants will find themselves without counsel whenever there is a similar case pending elsewhere. Unfortunately, not every one can afford to wait to see how some other case is resolved. Especially students.

Every time a civil rights defendant stopped the conduct challenged in the suit and claimed an unrelated court decision was the reason it changed its practices, each court has required the defendant to pay the plaintiffs' attorneys' fees. Every time except in the present case. This Court should resolve the conflicts in such an important issue as the enforcement of civil rights.

Contrary to the explicit decisions in the First and Third Circuits, the Ninth Circuit has in essence told all civil rights litigants and their attorneys that they are in a race in those case where civil rights violations are occurring in more than one instance. Where violations are isolated, a pro bono attorney may prosecute the case and rest assured that, if he or she obtains relief for the client, the court will normally require the defendant to pay a reasonable fee.

However, where the violations are widespread or at least where more than one case has been filed (as in the present case), the rules in the Ninth Circuit are much different. Two different cases were brought at different times challenging civil rights violations on different University of California campuses. The Ninth Circuit has allowed the district court to deny the plaintiffs in the second suit an attorneys' fee award. Creating a race to judgment and a "winner takes all" approach is contrary to the Congressional intent in Section 1988.

Few statutes receive so much judicial attention as the Civil Rights Act, and rightfully so. That statute represents

the primary tool for protecting individuals' constitutional rights. Moreover, the attorney fee provisions in 42 U.S.C. § 1988 provide the means for pro bono attorneys to represent those whose rights may be significant, but financial stake in the outcome insignificant for purposes of justify hiring counsel.

Contrary to the approach of other circuits, the Ninth Circuit approves a result which frustrates the purpose of the statute when government officials essentially agree that their policies are unconstitutional and repudiate them only after losing motions to dismiss the case against them.

This Court should grant this petition for a writ of certiorari and protect effectiveness of the Civil Rights Act in the enforcement of First Amendment rights.

III
THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

The tradition of the Supreme Court has been to look carefully at cases wherein First Amendment rights are at stake. The importance of First Amendment values is not limited to the judicial branch. In 1993, Congress enacted the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, to establish a statutory right to a higher level of scrutiny for claims involving burdens on the free exercise of religion. The Ninth Circuit's decision has relegated these traditionally honored rights to the status of a poor relation. Clearly, this is a striking departure from the history of constitutional jurisprudence in this country. Moreover, Judge Fernandez of the Ninth Circuit has used the opportunity of this case to cast doubt on the constitutionality of the Religious Freedom Restoration Act.

> I have serious doubts about the constitutionality of Congress's attempt to overrule *Smith* and to reinstate (or instate) a flawed view of the scope and proper construction of the religion clauses. In this I am not alone.

App. A at 11101 (numerous citations omitted).

In fact, Judge Fernandez opines that the "proper approach to all of these issues is to treat religion, non-religion, religious belief and other beliefs absolutely equally. The proper coign of vantage for the government is a promontory of neutrality." App. A at 11102. This approach would be perfectly logical if there were no Free Exercise of Religion Clause in the First Amendment. The First Amendment broadly protects speech of all kinds, but it does

not protect all kinds of activities--only the exercise of **religious** activities.

Judge Fernandez's concurring clouds the First Amendment rights relating to the exercise of religion which should be clarified by this Court. Nevertheless, his concurring opinion demonstrates the importance of having resolution of these issues for everyone's understanding of the rights to exercise religion.

CONCLUSION

The Ninth Circuit's decision is grounded in an unprecedented narrow construction of First Amendment rights. The decision allows government to withhold a benefit as significant as higher education unless students repudiate their sincerely held religious beliefs by subsidizing practices which strike deep to the heart of their religions convictions.

As to their free speech claims, the university officials ultimately agreed with students, but not until after having to litigate the issues and the students having to fend off the multiple attempts to have their case dismissed. To deny an award of attorneys' fees is an unwarranted and unwise frustration of the purpose of the Civil Right Act. Review by this Court is necessary to resolve the conflicts created by the Ninth Circuit's decision in this case.

this Court is necessary to resolve the conflicts created by the Ninth Circuit's decision in this case.

The students urge this Court to grant this Petition for Writ of Certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

DATED: January, 1997.

Respectfully submitted,
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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREGORY P. GOEHRING; DAVID MUELLER; JOHN P. GISLA, JR.; NANCY HARDER; GLENN NUNES; JOHN MULLEN,
Plaintiffs-Appellants,

v.

ROY T. BROPHY, JR.; DAVID PIERPONT GARDNER; THEODORE L. HULLAR; ROBERT E. CHASON,
Defendants-Appellees.

Nos. 94-16453
95-15009

D.C. No.
CV-92-00962-EJG

OPINION

Appeals from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted
April 9, 1996—San Francisco, California

Filed September 3, 1996

Before: Warren J. Ferguson, Dorothy W. Nelson, and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Ferguson;
Concurrence by Judge Fernandez

SUMMARY

Individual Rights/Religious Freedom

The court of appeals affirmed a judgment of the district court. The court held that the use of a mandatory registration

fee to subsidize abortion services by a state university's health insurance program does not violate First Amendment right of objecting students to the free exercise of their religion.

The University of California provides student health-insurance programs for all its students. Undergraduates who choose to buy health insurance receive a small subsidy that comes out of mandatory registration fees; graduate and professional students may opt out of the program if they show proof of qualifying insurance from another provider. Although the University's insurance program includes abortion services, the on-campus abortion services it offers are limited to outside referrals.

Appellant Gregory Goehring and other University students brought a federal action alleging that the mandatory registration fee violates their right to free exercise of religion because it is used in part to subsidize the abortion services provided by the University's health-insurance program. They asserted that their sincerely held religious beliefs prevented them from financially contributing to abortions. The complaint also alleged causes of action for violations of the students' rights to freedom of speech and association and of the Establishment Clause. The students also challenged the constitutionality of the University's use of registration fees to fund various political and ideological activities of student organizations.

In February 1993, the California Supreme Court decided *Smith v. Regents of the University of California*, 844 P.2d 500, which held that the collection and use of mandatory student fees to support political and ideological student organizations violates the First Amendment.

In November 1993, the University revised its mandatory student fee policy to eliminate the use of fees for funding student organizations and certain courses with political, ideological and/or religious agendas.

The district court dismissed the students' free speech, association, and Establishment Clause claims as moot as a result of the University's revision of its student fee policy. The court also granted the University's motion for summary judgment on the remaining free exercise claim.

The students moved for an award of attorneys' fees under 42 U.S.C. section 1988 (discretionary fees to non-government prevailing party in civil rights action), citing the University's revision of its student fee policy. In a brief they also requested additional discovery, attorneys' fees under 28 U.S.C. section 1927 (unreasonable and vexatious multiplication of proceedings by attorney) and an evidentiary hearing on the issue of attorneys' fees. The students contended that instead of defending, the University should have asked for a stay in proceedings until the outcome of *Smith* was determined.

The district court denied all of the motions, finding that the University's revision of its fee policy was in response to the Supreme Court's denial of certiorari in *Smith*.

The Religious Freedom Restoration Act (RFRA) provides that the government may not substantially burden a person's exercise of religion with a rule of general applicability, unless it is the least restrictive means of furthering a compelling governmental interest.

[1] To establish a violation of the RFRA, the plaintiffs had to show that the University's health-insurance program substantially burdened their right to free exercise of religion. If they established a substantial burden, the University had to demonstrate that its health insurance program was constitutionally permissible because it satisfied strict scrutiny. To do this, the University had to show that the program furthered a compelling interest and was the least restrictive means of doing so.

[2] The plaintiffs had to show that the University's subsidized health-insurance program imposed a substantial burden

on a central tenet of their religion. They failed to meet this burden. The plaintiffs were not required to purchase the University's subsidized insurance. The subsidy is not a substantial sum and is distributed only to students who elect to purchase insurance. The plaintiffs were not required to accept, participate in, or advocate for the provision of abortion services, which are not provided on the campus. The plaintiffs were not denied a public education because they were free to attend the University so long as they accepted the minimal limitation placed on their free exercise rights by the registration fee.

[3] A number of government interests are furthered by the University's subsidized health-insurance system: it provides students with affordable health insurance; helps to prevent the spread of communicable disease; and prevents students from being distracted from their studies by undiagnosed illnesses and medical bills they cannot afford to pay. [4] The University's interest in the health and well-being of its students, advanced by its mandatory fee policy, is compelling.

[5] This was not a case in which the government prohibited the plaintiffs from participating in a religious ritual, or penalized them for doing so, but involved a challenge to the way in which a governmental entity spends its money. [6] The vitality of the University's fee system would have been undermined if the plaintiffs were exempted from paying a portion of their registration fees on free exercise grounds. Mandatory student participation by every student is essential to the insurance system's survival. [7] There are few if any University-funded activities to which one student or another would not object. [8] The First Amendment does not prohibit the University from requiring all students, regardless of religion, to pay fees for general student support services.

[9] A party is a prevailing party within section 1988 if it has prevailed on the merits of at least some of its claims. [10] A catalyst test is an alternative theory for granting attorneys'

fees under section 1988 when no judicial relief has been granted, but the lawsuit prompts the defendant to take action. To show that the lawsuit was a catalyst, the plaintiff must show a causal link between the lawsuit and the relief obtained, and that there is a legal basis for the claim.

[11] The plaintiffs did not receive any relief that was not mandated by *Smith*. The changes made by the University were made to comply with *Smith*. [12] The mere fact that the University revised its fee policy after the district court rejected two motions to dismiss was insufficient to demonstrate that the court abused its discretion. Chronological events are not definitive in determining whether a defendant can be reasonably inferred to have guided its actions in response to a plaintiff's lawsuit.

[13] Broad discretion is vested in the trial court to permit or deny discovery. [14] The district court acted within its discretion in denying the plaintiffs' informal discovery request and an evidentiary hearing because they failed to show that denial would result in actual and substantial prejudice, or to explain what they hoped to accomplish from an evidentiary hearing.

[15] Imposition of sanctions under section 1927 requires a finding that the attorney acted recklessly or in bad faith. There was no evidence to show that the defendants acted in this manner.

Judge Fernandez concurred, writing that all that had to be decided in the case was that the University's policy was neutral and evenhanded.

COUNSEL

Richard M. Stephens, Olympia, Washington, for the plaintiffs-appellants.

Christopher M. Patti, Office of the General Counsel, University of California, Oakland, California, for the defendants-appellees.

OPINION

FERGUSON, Circuit Judge:

The plaintiffs, students at the University of California at Davis ("the University"), appeal the district court's grant of summary judgment in favor of the University with respect to their free exercise of religion claim. The plaintiffs allege that the University's mandatory student registration fee violates their right to free exercise of religion because the fee is used, in part, to subsidize the University's health insurance program, which covers abortion services.

On appeal the students challenge: (1) the district court's grant of summary judgment to the University; (2) the district court's denial of the students' request for attorney's fees pursuant to 42 U.S.C. § 1988; (3) the district court's denial of the students' request for discovery and an evidentiary hearing on the issue of attorney's fees; and (4) the district court's denial of the students' request for attorney's fees pursuant to 28 U.S.C. § 1927.

I. *Procedural Background*

On June 16, 1992, Gregory Goehring filed suit in district court against the Regents of the University of California and various officers of the University. On December 4, 1992, Goehring filed an amended complaint, adding five plaintiffs, and asserting six causes of action. The first three causes of action were "compelled speech" claims in which the plaintiffs alleged that their First Amendment rights to free speech were being violated by the University's policy of using mandatory

student fees to finance the following activities: (1) the lobbying activities of the Associated Students of the University of California at Davis; (2) certain courses offered at the University's Experimental College; (3) the University's Women's Research and Resources Center; and (4) the Third World Forum, a student newspaper. The fourth cause of action alleged that the University's provision of student health insurance, which included coverage for abortion services, violated the Hyde Amendment, Pub.L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994).[1] The fifth cause of action alleged that the use of student fees to fund the Experimental College violated the Establishment Clause. The sixth cause of action alleged that the University's practice of subsidizing student health insurance with mandatory student registration fees violated the students' rights to free exercise of religion because the University's student health insurance covered abortion services.

The district court dismissed all but the sixth cause of action, the free exercise of religion challenge. Subsequently, the district court granted the University's motion for summary judgment on this claim. The students appeal only the district court's grant of summary judgment on the free exercise of religion claim[2] and its rulings on the attorney's fees issues.

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[1]The Hyde Amendment, which is enacted each year as an amendment to 42 U.S.C. § 1396a, provides:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Pub.L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994).

[2]Because *Smith v. Regents of Univ. of Cal.*, 844 P.2d 500 (Cal.), *cert. denied*, 510 U.S. 863 (1993), involved a compelled speech challenge, it is not relevant to this appeal.

II. *Discussion*

A. **Free Exercise of Religion Claim**

We review a grant of summary judgment de novo. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court properly applied the relevant substantive law. *Id.*

The University has separate student health insurance programs for undergraduate students and for graduate and professional school students. Undergraduates are not required to have any health insurance, although they may choose to purchase it through the University's Undergraduate Student Health Insurance Program. The undergraduates who purchase insurance through the program receive a subsidy on their premiums in the amount of $18.50 per student, per quarter, which is taken from mandatory student registration fees.

Graduate and professional school students at the University are required to have health insurance. Under the Graduate Student Health Insurance Program, mandatory fees are collected from graduate and professional students to finance this program. This mandatory fee was established in 1989 after it was approved in a referendum by 87% of the graduate and professional students who voted. Graduate and professional students may opt out of the insurance program by demonstrating that they have qualifying health insurance from another provider. Those students who purchase insurance through the program receive a subsidy of $18.50 per insured student, per quarter, from registration fee receipts to reduce the cost of their premiums.

The University provides health services on campus to minimize the disruption of its students' academic pursuits due to illness or injury. The health insurance programs offered by the

University cover a variety of services, including abortion services. However, abortions are not performed at the University's Student Health Center. Any student seeking an abortion is referred to an outside provider. The plaintiffs in the present case, undergraduate and graduate students, object to subsidizing the cost of abortions through their student registration fee subsidy. The plaintiffs allege that their sincerely held religious beliefs prevent them from financially contributing to abortions, and therefore, the student subsidy violates their right to free exercise of religion under the First Amendment.

The Religious Freedom Restoration Act of 1993 ("the Religious Freedom Act"), 42 U.S.C. § 2000bb (Supp. V 1993), provides the framework for analyzing the plaintiffs' free exercise of religion claim.[3] The Religious Freedom Act provides in pertinent part:

> (a) IN GENERAL.– Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) EXCEPTION.– Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person–
>
> (1) is in furtherance of a compelling governmental interest; and

[3]The Religious Freedom Act was enacted by Congress in response to the holding in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). The Court, in *Smith*, held that the government need not justify burdens imposed on the free exercise of religion by neutral laws of general applicability. *Id.* at 878-79. The Religious Freedom Act restored the government's obligation to justify all substantial burdens on the free exercise of religion. 42 U.S.C. § 2000bb-1.

(2) is the least restrictive means of furthering that compelling governmental interest.[4]

[1] To establish a violation of the Religious Freedom Act, the plaintiffs in the present case first must show that the University's subsidized health insurance program substantially burdens their right to free exercise of religion. If the plaintiffs are able to establish a substantial burden, the University must then demonstrate that its subsidized health insurance program is constitutionally permissible because it satisfies strict scrutiny. To do this, the University must show that: (1) its subsidized health insurance program furthers a compelling interest; and (2) its insurance program is the least restrictive means of furthering that compelling interest.

1. SUBSTANTIAL BURDEN

In construing the Religious Freedom Act, we look to our decisions prior to *Smith*, in which this court held that:

> To show a free exercise violation, the religious adherent, . . . has the obligation to prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; *the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.*

Graham v. Commissioner, 822 F.2d 844, 850-51 (9th Cir. 1987) (emphasis added) (citations omitted), *aff'd sub nom. Hernandez v. Commissioner*, 490 U.S. 680 (1989).

[4]The Religious Freedom Act essentially requires the government to justify any regulation imposing a substantial burden on the free exercise of religion by showing that the regulation satisfies strict scrutiny.

The plaintiffs in *Graham* were members of the Church of Scientology ("the Church"). The plaintiffs brought suit alleging that the Tax Court's refusal to grant them tax deductions for payments made to the Church violated their right to free exercise of religion. *Graham*, 822 F.2d at 846. This court affirmed the decision of the Tax Court, denying the plaintiffs' request for deductions. *Id.* at 850. We explained that the plaintiffs would have alleged a valid free exercise claim if they had demonstrated that the government was conditioning the receipt of a tax deduction on the abandonment of a central tenet of their religion. *Id.* at 851. However, the plaintiffs failed to establish such a burden. "[T]he fact that taxpayers will have less money to pay the Church, or that the Church will receive less money, does not rise to the level of a burden on appellants' ability to exercise their religious beliefs. Statutes are not invalid just because they affect a religious organization's operation." *Id.* (citing *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1279 (9th Cir. 1982)).

The "substantial burden" requirement of a free exercise challenge was again addressed in *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995) (per curiam). The plaintiff in *Bryant*, an inmate, brought a free exercise claim against the prison in which he was confined. *Id.* at 948. The plaintiff alleged that his right to free exercise of religion was violated when the prison refused to provide him Pentecostal services. *Id.* This court rejected Bryant's free exercise challenge on the basis that Bryant had failed to allege any facts showing that the activities in which he wished to engage were mandated by his religion. *Id.* at 949. "[W]hile certain practices and instruments might be unique to the Pentecostal faith, Bryant has not argued or provided evidence to show that they are mandated by his faith." *Id.* This court concluded that Bryant did not establish a sufficient burden on his faith to allege a free exercise violation. *Id. See also United States v. Turnbull*, 888 F.2d 636, 639 (9th Cir. 1989), *cert. denied*, 498 U.S. 825 (1990).

[2] Accordingly, the plaintiffs in the present case must establish that the University's subsidized health insurance program imposes a substantial burden on a central tenet of their religion.[5] The plaintiffs have failed to meet this burden. The plaintiffs are not required to purchase the University's subsidized health insurance—undergraduate students are not required to have health insurance and graduate students may purchase insurance from any provider. Moreover, the student health insurance subsidy is not a substantial sum of money and the subsidy, taken from registration fees, is distributed only for those students who elect to purchase University insurance. Furthermore, the plaintiffs are not required to accept, participate in, or advocate in any manner for the provision of abortion services. Abortions are not provided on the University campus. Students who request abortion services are referred to outside providers. Finally, the plaintiffs' allegation that the University's health insurance system substantially burdens their right to free exercise of religion because it denies them a public education is incorrect. The plaintiffs are free to attend the University so long as they accept the minimal limitation placed on their free exercise rights by the University's registration fee.

In sum, the plaintiffs have failed to establish that the University's subsidized health insurance system imposes a substantial burden on the free exercise of their religion. However, even if the plaintiffs were able to satisfy the substantial burden requirement, the University's health insurance system nonetheless survives constitutional attack because it meets strict scrutiny—it is the least restrictive means of furthering a compelling government interest.

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[5]The University stipulated that the plaintiffs' sincerely held religious beliefs prohibit them from financially contributing to abortions. However, merely because the University has conceded that the plaintiffs beliefs are sincerely held, it does not logically follow, as the plaintiffs contend, that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion.

2. STRICT SCRUTINY ANALYSIS

a. Compelling Government Interest

A government regulation which imposes a substantial burden on an individual's right to free exercise of religion is constitutional only if it can be justified as the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000bb-1.

[3] There are a number of government interests which are furthered by the University's subsidized health insurance system:

> (1) The University's health insurance system provides its students with affordable health insurance. A large number of students would be unable to obtain affordable health insurance from another source if it was not available through the University.
>
> (2) The University's affordable health insurance helps to prevent the spread of communicable diseases which pose a serious problem on university campuses where students eat, sleep, and study in such close quarters.
>
> (3) The University's affordable health insurance prevents students from being distracted from their studies by undiagnosed illnesses and medical bills which they cannot afford to pay. The insurance system is planned so that students will remain healthy and be able to receive the full benefits of a higher education.

[4] Public health and well-being have been recognized as compelling governmental interests in a variety of contexts. *See Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 300 (1981) (holding that "[p]rotection of

the health and safety of the public is a paramount governmental interest" which justifies summary administrative action in the prevention of mining disasters); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1591 (1995) (stating that the government has a significant interest in protecting the health of its citizens by preventing brewers from competing on the basis of alcohol strength, which might lead to increased alcoholism); *Callahan v. Woods*, 736 F.2d 1269, 1274 (9th Cir. 1984) (stating that the AFDC program "promotes a government interest of the highest importance" in that it exists to care for needy dependent children). Similarly, we hold that the University's interest in the health and well-being of its students, advanced by its mandatory fee policy, is compelling.

b. Least Restrictive Alternative Analysis

The next step in strict scrutiny analysis, after having identified the compelling interests at stake, is to examine whether the means used to further those interests is the least restrictive way of doing so. 42 U.S.C. § 2000bb-1.

[5] Although the plaintiffs in the present case brought suit under the Free Exercise Clause, this is not a case in which the government has prohibited them from participating in a religious ritual, or penalized them for doing so. Rather, this case involves a challenge to the way in which the University, a governmental entity, spends its money. Accordingly, our least restrictive alternative analysis is guided by cases involving free exercise challenges to the government's use of tax dollars.

The Supreme Court addressed a free exercise challenge to the federal social security tax system in *United States v. Lee*, 455 U.S. 252 (1982). The plaintiff in *Lee*, a member of the Old Amish Order, brought suit alleging that the imposition of social security taxes violated his free exercise rights, as well as those of his Amish employees. *Id.* at 254-55. The Court accepted as true the plaintiff's contention that both the pay-

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are much more akin to those of a typical government agency than are those of the State Bar. The University, like a state government, provides a wide spectrum of services to students, whereas the State Bar acts largely as an intermediary between its members and the state government, working to advance certain specialized interests. *Id.* at 13. Therefore, *Keller* is distinguishable from the present case and we rely on *Lee*, *Autenrieth*, and *Erzinger* to conclude that the University's use of its registration fee to subsidize health insurance is the least restrictive means of furthering a compelling government interest.

In sum, the plaintiffs' free exercise claim fails because: (1) the students have not established that the University's subsidized health insurance system imposes a substantial burden on their right to free exercise of religion; and (2) the University's subsidized health insurance system is the least restrictive means of furthering a compelling government interest.

B. Request for Attorney's Fees Pursuant to 42 U.S.C. § 1988

1. FACTUAL BACKGROUND

The plaintiffs filed suit against the University in district court on June 16, 1992, alleging not only a free exercise violation, but also challenging the constitutionality of the University's use of its mandatory student registration fee to fund various political and ideological activities of its student organizations. The plaintiffs argued that the University's use of student fees to fund political and ideological activities violated their First Amendment rights to freedom of speech and freedom of association. The plaintiffs also brought an Establishment Clause challenge to the University's funding of its Experimental Colle[illegible] with student fees on the ground that the Experimental Co[illegible]e conducted classes on witchcraft and other religious r[illegible]s.

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On November 4, 1993, the University revised its mandatory student fee policy. This revision included the withdrawal of funding from student fees for a number of student organizations and courses offered at the Experimental College. On July 11, 1994, the district court dismissed the plaintiffs freedom of speech, freedom of association, and Establishment Clause causes of action as moot as a result of the University's revision of its student fee policy.

On August 20, 1994, the plaintiffs filed a motion for attorney's fees pursuant to 42 U.S.C. § 1988.[6] The plaintiffs alleged that they were entitled to attorney's fees as a prevailing party because the University had revised its student fee policy in response to their lawsuit. The University argued that it had revised its student fee policy in response to *Smith v. Regents of Univ. of Cal.*, 844 P.2d 500 (Cal.), *cert. denied*, 510 U.S. 863 (1993), and not in response to the plaintiffs' suit. The district court found that the plaintiffs' lawsuit was not the driving force behind the University's revision of its student fee policy, and therefore, the court denied the plaintiffs' motion for attorney's fees. The plaintiffs now appeal the district court's denial of this motion.

On February 3, 1993, the California Supreme Court rendered its decision in *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500. *Smith* held that the collection and use of mandatory student fees to support political and ideological student organizations violated the First Amendment. *Id.* at 516. Shortly after the decision in *Smith* was handed down, the Regents filed a petition for certiorari with the U.S. Supreme Court. The University alleges that it was aware from the time that *Smith* was decided that if the petition for certiorari was denied, the University would be required to revise its student fee policy. Therefore, University administrators began the

[6]42 U.S.C. § 1988 provides that in civil rights actions, the court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b).

process of drafting, circulating, and revising the University's student fee policy to comply with *Smith* while the petition for certiorari was still pending. Several meetings were held during which policy drafts of a revised student fee policy were discussed, debated, and revised.

On October 4, 1993, the Supreme Court denied certiorari in *Smith*, 510 U.S. 863 (1993). The University promptly revised its student fee policy and announced its revisions on November 4, 1993. This revised student fee policy ("the *Smith* policy") prohibited the use of student fees to support political, ideological, or religious organizations and activities. It also provided a mechanism for students to request and receive a refund of the portion of their fees that had gone to support such organizations in the past.

2. ANALYSIS

A district court's award of attorney's fees pursuant to 42 U.S.C. § 1988 is reviewed for an abuse of discretion. *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995). A district court's factual determinations underlying a prevailing party determination will not be set aside absent clear error. *Sablan v. Department of Fin.*, 856 F.2d 1317, 1324 (9th Cir. 1988).

[9] A party is a prevailing party within the meaning of section 1988 if the party has prevailed on the merits of at least some of its claims. *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980). An inquiry is made into whether the plaintiff has " 'succeed[ed] on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit.' " *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

[10] This court also recognizes a catalyst test as an alternative theory for granting attorney's fees under 42 U.S.C. § 1988 when no judicial relief has been granted. *Kilgour*, 53

F.3d at 1010. Under the catalyst test, a plaintiff is a prevailing party for the purposes of section 1988 if its lawsuit prompted the defendants to take action to satisfy its demands. *Sablan*, 856 F.2d at 1325. In order for a plaintiff to show that the lawsuit was the catalyst which prompted action by the defendants, the plaintiff must show that: (1) there is a "causal link" between the lawsuit and the relief actually obtained; and (2) there is a legal basis for the claim. *Id.*

With respect to the first prong of the test, the plaintiffs in the present case point to two factors which they argue indicate that their lawsuit caused the University to revise its student fee policy. First, the plaintiffs allege that they received relief beyond that necessitated by the decision in *Smith*. The plaintiffs allege that the following actions by the University were not mandated by *Smith*: (1) The defendants altered their student fee policy to prohibit not only the funding of "political and ideological" organizations and activities, but also to prohibit the funding of "religious" organizations and activities, including instructional activities at the Experimental College; and (2) The defendants fashioned a unique remedy for plaintiff Goehring.

[11] However, it is clear that the plaintiffs did not receive any relief which was not mandated by *Smith*. The changes made by the University to its student fee policy were made to comply with both the letter and the spirit of the *Smith* decision. Moreover, the plaintiffs submitted a Stipulated Statement of Facts to the district court stating that the University enacted its revised student fee policy "to bring its policies in compliance with the *Smith* decision." The plaintiffs' allegation that Goehring was personally granted relief beyond that mandated by *Smith* is false as well. The relief granted to Goehring was the same type of relief as that fashioned for the plaintiffs in *Smith*, and was granted to Goehring in accordance with the University's *Smith* policy.

[12] The second basis on which the plaintiffs rely in alleging a causal link between their lawsuit and the University's revision of its fee policy is a sequence of events argument. The plaintiffs assert that the University did not revise its student fee policy until *after* the plaintiffs had defeated two of the University's motions to dismiss.[7] Therefore, the plaintiffs argue, their lawsuit was the impetus behind the University's change in its fee policy. The district court, in contrast, found that the University changed its policy in response to the denial of certiorari in *Smith*. The mere fact that the University revised its fee policy after the court rejected two motions to dismiss is insufficient to demonstrate that the district court abused its discretion in denying attorney's fees pursuant to § 1988. Although "chronological events are important, . . . [they are] not a definitive factor[ ] in determining whether or not a defendant can be reasonably inferred to have guided his actions in response to a plaintiff's lawsuit." *Braafladt v. Board of Governors*, 778 F.2d 1442, 1444 (9th Cir. 1985). *See also Beach v. Smith*, 743 F.2d 1303, 1306-07 (9th Cir. 1984) (holding that the district court did not clearly err in finding that the plaintiff failed to prove a causal connection where the plaintiff provided no direct evidence of causation, and relied solely on the sequence of events); *American Constitutional Party v. Munro*, 650 F.2d 184, 187-88 (9th Cir. 1981) (holding that "chronology of events" evidence supplemented by a legislator's affidavit stating that the plaintiff's lawsuit had been discussed prior to passage of an amendment was insufficient evidence of a causal link).

C. Request for Discovery and an Evidentiary Hearing

The plaintiffs, in their reply brief to the district court, made a last-minute request for additional discovery and an evidenti-

[7]The University filed two motions to dismiss which were denied on March 5, 1993 and August 13, 1993, with respect to the students' freedom of speech and freedom of association claims.

ary hearing on the issue of attorney's fees. The plaintiffs now appeal the district court's denial of this informal request.

[13] A district court's decision whether to permit additional discovery on the issue of attorney's fees is reviewed for an abuse of discretion. *Sablan v. Department of Fin.*, 856 F.2d 1317, 1321 (9th Cir. 1988). "Broad discretion is vested in the trial court to permit or deny discovery, and its decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." *Id.* (citation and quotation omitted).

[14] The district court clearly acted within its discretion in denying the plaintiffs' informal request for discovery and an evidentiary hearing because the plaintiffs failed to show that the denial of discovery would result in actual and substantial prejudice. Moreover, the plaintiffs failed to explain what they hoped to accomplish from an evidentiary hearing. *See Williams v. Alioto*, 625 F.2d 845, 849 (9th Cir. 1980) (holding that the district court did not abuse its discretion in denying the plaintiff's late request for an evidentiary hearing on the issue of attorney's fees), *cert. denied*, 450 U.S. 1012 (1981).

D. Request for Attorney's Fees Pursuant to 28 U.S.C § 1927

The plaintiffs also made a last-minute request for attorney's fees pursuant to 28 U.S.C. § 1927 in their reply brief to the district court. The plaintiffs now appeal the district court's denial of this request.

A district court's factual findings underlying its decision to impose sanctions pursuant to 28 U.S.C. § 1927 are reviewed for clear error. *Bader v. Itel Corp. (In re Itel Securities Litigation)*, 791 F.2d 672, 674 (9th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987). The legal conclusions of the district court

are reviewed de novo. *Id.* The appropriateness of the sanction is reviewed for an abuse of discretion. *Id.*

Section 1927 provides that an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to personally satisfy the . . . attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. The plaintiffs in the present case allege that the defendants unreasonably and vexatiously multiplied the proceedings by continuing to defend against this action when the defendants were aware that they might be required to revise their student fee policy in response to the *Smith* decision. The plaintiffs argue that the defendants should have asked for a stay in proceedings until the outcome of *Smith* was determined.

[15] "The imposition of sanctions under section 1927 requires a finding that the attorney acted recklessly or in bad faith." *Kanarek v. Hatch*, 827 F.2d 1389, 1391 (9th Cir. 1987). There is no evidence in the record to show that the defendants in the present case acted in this manner.

Therefore, the district court did not abuse its discretion in denying the plaintiffs' motion for attorney's fees pursuant to 28 U.S.C. § 1927.

III. *Conclusion*

The decision of the district court is AFFIRMED. The plaintiffs request for attorney's fees on appeal is denied.

FERNANDEZ, Circuit Judge, concurring:

I concur in Judge Ferguson's opinion, but write separately to express some concerns about the reasoning he has been required to employ.

In my opinion, the Supreme Court began to light the way to a proper construction of the First Amendment's clauses on religion when it decided *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). I do not agree with this court's crabbed view of that case, which suggests that it is limited to criminal matters. *See American Friends Serv. Comm. Corp. v. Thornburgh*, 961 F.2d 1405, 1407 (9th Cir. 1992); *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1305 (9th Cir. 1991), *cert. denied*, 504 U.S. 985, 112 S. Ct. 2965, 119 L. Ed. 2d 586 (1992). That simply overlooks the general principles established in *Smith*, which point to the dangers of attempting to analyze the validity of neutral laws from the vantage point of some individual's religious beliefs. *See* 494 U.S. at 882-89, 110 S. Ct. at 1602-06. In other words, in *Smith* the Supreme Court reminded us that laws of general application do not run afoul of the religion clauses; rather, those clauses assume and require an evenhanded neutrality both toward and on behalf of religious belief. Were there any doubt about the accuracy of this observation it was laid to rest when the Court decided *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). There the Court said, again and again, that what the religion clauses demand is "neutrality." *See, e.g., id.* at 531, 533-34, 541, 113 S. Ct. at 2226, 2227, 2231. The Court also insisted upon general applicability, but as Justice Scalia pointed out, that and neutrality greatly overlap. *Id.* at 557-58, 113 S. Ct. at 2239 (Scalia, J., concurring). Neutrality points to a requirement that the laws be evenhanded "by their terms"; general applicability to a requirement that they be so in "design, construction [and] enforcement." *Id.* at 557, 113 S. Ct. at 2239. I use the single word "neutrality" to refer to both facets. That approach would easily resolve this case in favor of the University. *Cf. Smith v. Fair Employment & Housing Comm'n*, 12 Cal. 4th 1143, 1161-65, 913 P.2d 909, 919-21, 51 Cal. Rptr. 2d, 700, 709-12 (1996) (FEHC) (neutrality approach easily decides First Amendment issue).

Moreover, I have serious doubts about the constitutionality of Congress's attempt to overrule *Smith* and to reinstate (or instate) a flawed view of the scope and proper construction of the religion clauses. In this I am not alone. *See, e.g., FEHC*, 12 Cal. 4th at 1179-92, 913 P.2d at 931-39, 51 Cal. Rptr. 2d at 722-30 (Mosk, J., concurring). Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. Rev. 437, 444-45, 452-60 (1994); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 Tex. L. Rev. 247, 285-302 (1994). Nevertheless, we have already at least tacitly decided that the provisions of the RFRA should be followed.[1] *See Cheema v. Thompson*, 67 F.3d 883, 885-86 (9th Cir. 1995); *Droz v. Commissioner*, 48 F.3d 1120, 1122-24 & n.2 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 698, 133 L. Ed. 2d 656 (1996); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1392-95 & n.1 (9th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 510, 130 L. Ed. 2d 417 (1994). The parties do not argue to the contrary.

Justice Mosk has outlined some of the problems which are subtended when courts undertake decisions about whether certain views are "central" to a person's religion or religious beliefs. *See FEHC*, 12 Cal. 4th at 1189-90, 913 P.2d at 938, 51 Cal. Rptr. 20 at 728-29 (Mosk, J. concurring). Moreover, once we wander off the lighted neutrality path we are in the midst of a dense bog, and our reason for doing so hardly matters. Nor does it matter that we wandered to one side or the other. In either case, we are in danger of being sucked into a

[1]Flawed construction of the religion clauses may not be the only reason to question the RFRA. *See, e.g., Flores v. City of Boerne*, 877 F. Supp. 355, 357 (W.D. Tex. 1995), *rev'd*, 73 F.3d 1352, 1363 (5th Cir. 1996); Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539, 1624-33 (1995); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39, 60-79 (1995). However, for purposes of this opinion those theories are not important.

mire of confusion or overcome by a miasma of dubiety. In this area we find ourselves parading out complex tests and reasons, none of which are particularly logical or convincing.

We have to explain why members of one religion can carry knives to school when no one else can. *Cheema*, 67 F.3d at 885-86. We find ourselves struggling to explain why people who have a particular belief must still pay their taxes, even though those taxes will be used to foster programs that are antithetical to their beliefs. *See Droz*, 48 F.3d at 1122-24; *see also United States v. Lee*, 455 U.S. 252, 259-61, 102 S. Ct. 1051, 1056-57, 71 L. Ed. 2d 127 (1982). We find ourselves spilling a good deal of ink trying to explain just why, or how, a police department can examine the activities of a high-ranking officer to see if he is properly performing his job. *See Vernon*, 27 F.3d at 1392-95. Finally, we find ourselves trotting out the same complex formulae to try to explain to Goehring why he must pay his student fees, even if they will be used to fund projects that are anathema to him. In each case, however, the answer should be that the governmental action in question is perfectly neutral and evenhanded. Any restriction or mulct is evenly applied to all and only falls upon the particular believer in the way that it falls on everyone else. That is why taxes and fees must be paid. That is why performance can be examined.[2] If we cannot say that a law or practice is evenhanded, the law or practice itself should fall, and that is an end to it.

In fine, in my opinion the proper approach to all of these issues is to treat religion, non-religion, religious belief, and other beliefs absolutely equally. The proper coign of vantage for the government is a promontory of neutrality. That would yield a simple and correct answer to this case — Goehring must pay his fees just as everyone else must. He may not like a particular use of those fees by the University, but then oth-

[2]Of course, this approach would also require that knife carrying by children in school will not be permitted religious beliefs notwithstanding.

ers might not like other uses. That is not the point. The point is that the fees must be paid by all who attend the University, without respect to sect or belief. However, our precedent forces us into the more complicated approach we have taken in this case, an approach which fortunately arrives at the same right answer.

Thus, I concur.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY P. GOEHRING; DAVID MUELLER; JOHN P. GISLA, JR.; NANCY HARDER; GLENN NUNES, and JOHN MULLEN, Plaintiffs-Appellants, v. ROY T. BROPHY, JR.; DAVID PIERPONT GARDNER; THEODORE L. HULLAR; ROBERT E. CHASON, Defendants-Appellees.	)	Nos. 94-16453; 95-15009 ORDER

BEFORE: D.W. NELSON, FERGUSON, and FERNANDEZ, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing.

The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge has requested a vote on whether to hear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

FILED
FEB 26 1997
OFFICE OF THE CLERK

No. 96-1197

In The

Supreme Court of the United States

October Term, 1996

GREGORY P. GOEHRING, et al.,

Petitioners,

v.

TIRSO DEL JUNCO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act exempt individuals from contributing financially to government expenditures that they oppose on religious grounds?

2. Was the district court's factual finding that petitioners were not entitled to attorneys fees because their suit was not a cause of defendants' discontinuance of some challenged practices clearly erroneous?

PARTIES

Petitioners, Gregory P. Goehring, David Mueller, John P. Gisla, Jr., Nancy Harder, Glenn Nunes, and John Mullen, are former students at the University of California at Davis ("UCD").

Respondents are the Chair of the Board of Regents of the University of California, the President of the University of California, the Chancellor of UCD, and the Vice Chancellor of Student Affairs at UCD, sued in their official capacities. All of the individuals originally named as defendants in the petitioners' complaint and the Petition for Writ of Certiorari no longer hold those offices. The current holders of those offices are, respectively, Tirso del Junco, Richard C. Atkinson, Larry N. Vanderhoef, and Carolyn F. Wall. Those individuals should be substituted as defendants pursuant to Federal Rules of Civil Procedure, Rule 25(d)(1).

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SUMMARY OF ARGUMENT

Neither of the questions petitioners raise warrants this Court's review. Applying standards that petitioners concede are appropriate, the Ninth Circuit rejected petitioners' claim that they are exempt from contributing to government expenditures that they oppose on religious grounds. That decision is consistent with a long and unanimous line of cases holding that individuals do not have religious line item veto power over government spending.

Similarly, in affirming the district court's denial of petitioners' request for attorneys' fees, the Ninth Circuit applied well-settled precedent that requires petitioners to make a factual showing that their lawsuit was a causal factor in obtaining relief. Petitioners do no more than challenge the district court's factual findings, findings that were supported by overwhelming evidence. The Petition should be denied.

ARGUMENT

I. SUPREME COURT REVIEW OF THE COURT OF APPEAL'S DECISION ON PETITIONERS' FREE EXERCISE CLAIM IS UNWARRANTED

Petitioners' free exercise of religion claim is a challenge to the requirement that they, along with all other similarly situated students at the University of California at Davis, pay a registration fee, a small portion of which subsidizes the cost of student health insurance policies. Those insurance policies provide coverage for abortion

services. Petitioners' religions oppose support for abortion. Fundamentally, petitioners contend that they are legally exempt from contributing to government expenditures that they oppose on religious grounds. The Ninth Circuit's rejection of this claim was a straightforward application of statutory language and the well-established precedents of this Court. It does not warrant further review.

In affirming the district court's rejection of petitioners' claim, the Ninth Circuit correctly applied the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. § 2000bb.[1] The Ninth Circuit held that the University's insurance system does not impose a "substantial burden" on the free exercise of petitioners' religion. *Goehring v. Brophy*, 94 F.3d at 1299-1300. As the court concluded, the

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[1] Although the Petition frames the issue in terms of a "Free Exercise Clause claim" (*e.g.*, Pet. at p. 8), petitioners' analysis is based, not on this Court's most recent Free Exercise Clause jurisprudence, as reflected in *Employment Div., Dep't. of Human Resources v. Smith*, 494 U.S. 872 (1990), but on the standards established in the RFRA. In *Smith*, the Court rejected application of the "compelling governmental interest" and "least restrictive means" test, set forth in cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963), to facially neutral laws of general applicability. The expressed congressional intent behind the RFRA was to "overrule" *Smith* by statutorily restoring the *Sherbert v. Verner* test. See 42 U.S.C. § 2000bb(b)(1). Accordingly, the Ninth Circuit looked to pre-*Smith* decisions in applying the RFRA. *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996). Other circuits have also relied on pre-*Smith* Free Exercise Clause decisions, including *United States v. Lee*, 455 U.S. 252 (1982), in interpreting the RFRA. See *e.g.*, *In re Young*, 82 F.3d 1407, 1419 (8th Cir. 1996). Petitioners do not challenge application of these pre-*Smith* decisions to their claim.

connection between mandatory student fees and support for abortion services is extremely attenuated. *Id.* at 1300. Furthermore, the Ninth Circuit correctly determined that, even if petitioners' free exercise rights were substantially burdened, the University's interest in the health and well-being of its students is compelling and that its mandatory fee system constituted the least restrictive means of advancing that interest. *Ibid.*

This case is inappropriate for review by this Court for a number of reasons. First, it does not require the resolution of any important disputed issue of law. All parties and the Ninth Circuit agreed that the "substantial burden/compelling interest/least restrictive means" test – whether drawn from the pre-*Smith* case law or from the RFRA (see footnote 1, above) – applies to petitioners' claim. Thus, at best, the error that petitioners assert "consists of . . . the [supposed] misapplication of a properly stated rule of law" and is unworthy of review by this Court. Sup. Ct. R. 10.

Second, as noted above, petitioners' claim reduces to an assertion that the RFRA (and pre-*Smith* case law) permits individuals to refuse to provide financial support for any government expenditures that they oppose on religious grounds. This Court disposed of that argument 15 years ago in *United States v. Lee*, 455 U.S. 252, *supra*. The Court rejected the claim of a member of the Old Amish Order who brought suit alleging that he should be constitutionally exempt from paying Social Security taxes for his employees because his religious beliefs prohibited him from accepting benefits from or contributing to the Social Security system. The Court noted that recognizing such an exemption would lead to governmental chaos:

> If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.

Id. at p. 260.

The Ninth Circuit merely applied the *Lee* holding to the present case: "Similarly, the fiscal vitality of the University's fee system would be undermined if the plaintiffs in the present case were exempted from paying a portion of their student registration fee on free exercise grounds." *Goehring*, 94 F.3d at 1301 (citing *Lee*).

"If the students at the University could refuse to pay a portion of their registration fee on religious grounds, the University's fee system would be seriously undermined. There are few, if any University funded activities to which one student or another would not object." *Id.* at 1302.[2]

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[2] Citing *Keller v. State Bar of California*, 496 U.S. 1 (1990), petitioners attempt to distinguish *Lee* on the ground that "the students do not pay these fees because they are citizens of California or citizens of Davis, but because they are students." (Pet. at 12.) First, this distinction undermines, rather than supports petitioners' claim. The fact that plaintiffs *voluntarily* subjected themselves to mandatory fees – by choosing to attend UCD – can only weaken their argument. As this Court stated in *Lee*, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own

Third, although the heading of petitioners' argument claims that the Ninth Circuit's decision "is in conflict with those of other United States Court of Appeals" (see Petition at 8), *petitioners fail to cite a single decision of another court of appeal on this issue,* conflicting or otherwise. In fact, in a unbroken line of decisions reaching back over a quarter century, the federal appellate courts have uniformly rejected the claim that religious adherents may avoid financial obligations to the state because they object to state expenditures. *See South Ridge Baptist Church v. Indus. Com'n of Ohio,* 911 F.2d 1203 (6th Cir. 1990), *cert. denied,* 498 U.S. 1047 (1991); *Bethel Baptist Church v. U.S.,* 822 F.2d 1334, 1338-40 (3d Cir. 1987), *cert. denied,* 485 U.S. 959 (1988); *Nelson v. United States,* 796 F.2d 164, 167-68 (6th Cir. 1986); *Olsen v. C.I.R.,* 709 F.2d 278, 280-82 (4th Cir. 1983); *Lull v. C.I.R.,* 602 F.2d 1166, 1168 (4th Cir. 1979), *cert. denied,* 444 U.S. 1014 (1980); *First v. C.I.R.,* 547 F.2d 45 (7th Cir. 1976); *United States v. Malinowski,* 472 F.2d 850 (3d Cir. 1973), *cert. denied,* 411 U.S.

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conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in the activity." 455 U.S. at 261.

Second, the discussion petitioners cite from *Keller* involved an issue entirely different from the one presented here: whether the State Bar of California is a government agency able to invoke a recognized exception to the "compelled speech" doctrine of the First Amendment's Free Speech Clause. *Keller,* 496 U.S. 10-11. The Court determined that the State Bar was not a "government agency." *Ibid.* Such analysis has no application to petitioners' RFRA claim. Moreover, petitioners cannot have it both ways. If the University of California is not the "government," the RFRA does not apply to it. 42 U.S.C. § 2000bb-1(a) and § 2000bb-2(1).

970 (1973); *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970). *See also Erzinger v. Regents of University of California*, 137 Cal.App.3d 389 [187 Cal.Rptr. 164], *cert. denied*, 462 U.S. 1133 (1983) (holding that plaintiff's free exercise rights were not violated by mandatory student fee, a portion of which subsidized student health services including abortion services).[3]

Finally, in Part III of their argument, petitioners suggest that the Court grant certiorari to determine RFRA's constitutionality. That issue is not raised by this case. The Ninth Circuit applied the RFRA without even considering its constitutionality. It had no need to reach this constitutional question because the University's student fees were permissible under the RFRA and therefore necessarily so under *Employment Division v. Smith*, which would apply if the RFRA were overturned.

Although petitioners do not claim that the Ninth Circuit's decision raises the issue, they suggest that the Court grant certiorari in this case because in his concurring opinion one Ninth Circuit judge expressed "serious doubts" about the constitutionality of the RFRA (while conceding that the Ninth Circuit had "at least tacitly decided that the provisions of the RFRA should be followed"). *Goehring*, 94 F.3d at 1306 (Fernandez, J., concurring). Thus, petitioners wish this Court to issue an advisory opinion on the Act's constitutionality because the "concurring opinion demonstrates the importance of

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[3] It is worth pointing out that this Court had denied certiorari on cases raising this issue at least six times.

having resolution of these issues for everyone's understanding of the rights to exercise religion." (Pet. at 20.) Even if certiorari were proper for such a purpose, it would be unnecessary in this case. The Court has already granted certiorari and recently heard argument in *Flores v. City of Boerne, Tex.*, 73 F.3d 1352 (5th Cir. 1996), *cert. granted*, 136 L.Ed.2d 212 (October 15, 1996, Supreme Court Case No. 95-2074), a case that squarely presents the constitutionality of the RFRA. This case does not.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW FACTUAL FINDINGS OF THE DISTRICT COURT REGARDING PETITIONERS' RIGHT TO ATTORNEY'S FEES

Resolution of petitioners' claim for attorney's fees rests entirely on the correctness of the district court's factual findings, and is therefore inappropriate for review by this Court. Sup. Ct. R. 10.[4] Petitioners had challenged the University's use of mandatory student fees to support certain student organizations under this Court's "compelled speech" cases, such as *Keller v. State Bar*, 496 U.S. 1 (1990) and *Abood v. Detroit Board of Education*, 431 U.S. 209

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[4] Thus, petitioners' proposed "question presented" – "Are civil rights plaintiffs entitled to an attorney fee award pursuant to 42 United States Code section 1988 when the government entity ceases the challenged conduct *but claims* the cessation was motivated by a similar but separate lawsuit" (emphasis added) – is disingenuous. The district court and the Ninth Circuit rejected petitioners' fee request because they *found*, as a factual matter, that petitioners' suit was not a cause of the cessation of the challenged conduct, not merely because the University "claimed" as much.

(1977). During the pendency of the suit, the University discontinued mandatory fee support for some of those organizations, and petitioners dropped their challenge to the rest, rendering the "compelled speech" claim moot. Despite the fact that the district court ultimately dismissed all of their claims, petitioners contended that they were "prevailing parties" under 42 U.S.C. § 1988 and entitled to attorney's fees. The district court disagreed, and the Ninth Circuit affirmed.

Contrary to the suggestion in the Petition, there is no conflict between the Ninth Circuit's decision and the legal standard set forth by other courts of appeals. The Ninth Circuit held that, where the defendant had ceased a challenged practice during the litigation, plaintiff, to qualify as a prevailing party, must demonstrate a "causal link" between the cessation and their lawsuit. *Goehring*, 94 F.3d at 1304. This is the same standard applied by decisions of the other circuits, including all the cases petitioners cite. *See, e.g., Metro Pittsburgh Crusade for Voters v. Pittsburgh*, 964 F.2d 244, 251 (3d Cir. 1992) (plaintiffs' action must have "constituted a material contributing factor" in obtaining relief); *Heath v. Brown*, 858 F.2d 1092, 1094 (5th Cir. 1988) (plaintiff's suit must be "a substantial factor or significant catalyst"); *Morrison v. Ayoob*, 627 F.2d 669(3d Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1102 (1981) ("there must be a causal relationship between the action and the ultimate relief received"); *United Handicapped Federation v. Andre*, 622 F.2d 342, 346 (8th Cir. 1980) (plaintiff's suit must be a "necessary and important factor"). On the other hand these decisions hold that, "no award is required if the court determines

that plaintiff's suit was completely superfluous in achieving the improvements undertaken by defendants on plaintiff's behalf." *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978). The courts of appeals also agree that the existence or non-existence of a causal relationship is a factual determination for the district court which may be overturned only if clearly erroneous. *See, e.g., Heath v. Brown*, 858 F.2d at 1094.

Here, the district court made a factual finding that petitioners' suit was *not* a cause of the University's change in its student fee policy. *See Goehring v. Brophy*, 94 F.3d at 1303. Rather, the district court found (and the Ninth Circuit affirmed) that the University's alteration of its student fee policy was purely the result of the California Supreme Court's decision in *Smith v. Regents of Univ. of Cal.*, 4 Cal.4th 843, *cert. denied*, 510 U.S. 863 (1993), which was handed down during the pendency of the district court action and which held the University's fee policy unconstitutional on "compelled speech" grounds.

The district court's finding was supported by overwhelming evidence. Unchallenged, sworn testimony from University administrators involved in writing the new policy, as well as contemporaneous documents, demonstrated that the change was made entirely in response to the California Supreme Court's decision in *Smith v. Regents* and that those responsible for the policy change *were not even aware that this litigation was pending*. Indeed, *even petitioners* stipulated that the University revised its fee policy "to bring its policies in compliance with the *Smith* decision." *See Goehring*, 94 F.3d at 1304. Petitioners offered *no* evidence that their suit had any impact on the University's revision of its student fee policy. As the

Ninth Circuit concluded "it is clear that the plaintiffs did not receive any relief which was not mandated by *Smith*." *Ibid.*

Thus, the district court and Ninth Circuit attorney's fees holdings are based not on application of some discordant legal standard, but on the factual conclusion that petitioners' lawsuit had nothing to do with the change in policy that rendered their free speech claims moot. That finding is not a proper subject for review by this Court.

III. CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

DATED: February 26, 1997

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